IN THE

Supreme Court of the United States

MAY TERM, 1967

No.

BRENARD G. RHOADES, et al

v.

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, et al

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

STATEMENT AS TO JURISDICTION

Apellants, BRENARD G. RHOADES, FREDERICK E. STEWART, JR., ELIZABETH W. STEWART, A. G. MUTTIMER appeal from the final order and judgment of the Supreme Court of Pennsylvania entered January 17, 1967, dismissing their complaint. HORACE A. ZELLEY and MARY J. ZELLEY, plaintiffs in the lower courts have stated that they do not wish to join the appeal to the Supreme Court of the United States. The complaint alleged that the act of June 15, 1965 of the Legislature of Pennsylvania, known as Act No. 91, approved June 15, 1965, is unconstitutional and invalid in that it requires Boards of School Directors to provide at taxpayer expense transportation of pupils to church schools where similar transportation is provided to pupils attending public schools. The complaint asked that the court enjoin the defendant School District of Abington Township from entering into any contract under the [illegible] Act

(a)

OPINIONS BELOW

The opinions of the Pennsylvania Supreme Court have been officially reported and appear at 424 Pa. 202 and 226 A. 2d. 53. They are appended to this petition as Appendix A.

(b)

GROUNDS ON WHICH JURISDICTION IS INVOKED

(a) On August 30, 1965, the plaintiffs filed an action as taxpayers of the school district in the Court of Common Pleas of Montgomery County, Pennsylvania against the School District of Abington Township. They brought the action on their own behalf and on behalf of all taxpayers of [illegible] District. The plaintiffs asked that the Court of Common Pleas of Montgomery County enter a decree [illegible] Act No. 299 approved June 15, 1965, to be [illegible] and unconstitutional, and further requested [illegible] School District [illegible] pending [illegible] that they [illegible] and the [illegible]

vania is February 6, 1967). That court below upheld the constitutionality of Act No. 91 by a five to two majority. The notice of appeal was filed in Court of Common Pleas of Montgomery County and the Supreme Court of Pennsylvania April 10, 1967.

(iii) The statutory provisions which confer on the Supreme Court of the United States jurisdiction to review the judgment of the Supreme Court of Pennsylvania on appeal appear at Title 28, United States Code, Section 1257, (2) and Section 2101.

(iv) Cases which sustain that jurisdiction include *American Oil Co.* v. *Neill*, 380 U.S. 451 at 455; *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86; *Central Railroad Co. of Pennsylvania* v. *Pennsylvania*, 370 U.S. 607; and *Walker* v. *Taylor, et al*, 5 How. (46 U.S.) 64.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Act No. 91 of the Legislature of the Commonwealth of Pennsylvania, approved June 15, 1965, Pamphlet Laws, p. 126, 24 Purdon's Statutes Annotated, Section 31-1301 (Pocket Part).

"An Act amending the act of March 10, 1949 (P.L. 30) entitled, 'An act relating to the public school system, including certain provisions applicable as well to private and parochial schools; amending, revising, consolidating and changing the laws relating thereto, further providing for health, welfare and safety of the children of the Commonwealth by requiring school districts, [illegible]

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1.

Section 1361, act of March 10, 1949 (P.L. 30), known as the "Public School Code of 1949," is amended to read:

Section 1361. When provided.

The board of school directors in any school district may, out of the funds of the district, provide for the free transportation of any resident pupil to and from the public schools and to and from any points in the Commonwealth in order to provide tours for any purpose connected with the educational pursuits of the pupils. When provision is made by a board of school directors for the transportation of resident pupils to and from the public schools, the board of school directors shall also make provision for the free transportation of pupils who regularly attend nonpublic elementary and high schools not operated for profit. Such transportation provided for pupils attending nonpublic elementary and high schools not operated for profit shall be over established public school bus routes. Such pupils shall be transported to and from the point or points on such routes nearest or most convenient to the nonpublic schools. The board of school directors shall provide transportation whenever so required by any of the provisions of this act or of any other act of Assem-

tricts to help defray the cost of transporting pupils and the additional costs incurred by the boards of school directors in furnishing transportation under said amendments shall be included in the amounts for which reimbursement may be received from the Commonwealth as now provided by law.

Section 3.

This act shall take effect July 1, 1965.

Approved the 15th day of June A. D. 1965.

(c)

QUESTIONS PRESENTED BY THE APPEAL

(1) Does the Act No. 91 of June 15, 1965 of the Pennsylvania Legislature, 24 P.S. § 13-1361 (which provides, inter alia:

"When provision is made by a board of school directors for the transportation of resident pupils to and from the public schools, the board of school directors shall also make provision for the free transportation of pupils who regularly attend nonpublic elementary and high schools not operated for profit.")

when applied so as to provide free transportation at government expense for students attending church-related schools contribute to the establishment of religion so as to be unconstitutional under the religious clauses of the First Amendment of the Constitution of the United States made applicable to the states by the Fourteenth Amendment?

(2) Is a church-related school (defined in part as a school under the direct or indirect control of a church or religious organization, a purpose of which is to inculcate religious faith or doctrine and conduct in the student) a part of a church or religious [illegible]

aid to the school would be aid to the church or religion as prohibited by the religious clauses of the First Amendment to the United States Constitution?

(3) Is the furnishing of bus transportation to transport students to and from, or part way to and from, church-related schools such a part of the functions of the school that government aid in furnishing the transportation equates with aid to the church school or religion prohibited by the religious clauses of the First Amendment to the United States Constitution?

(4) Is government aid to a church school (not otherwise available to all public or private institutions as a service performed by government — without regard to the nature of the recipient — such as defense, health or fire protection) an aid to the establishment of religion and thus unconstitutional as contributing to the establishment of religion, prohibited under the religious clauses of the First Amendment to the United States Constitution?

(5) Does the administration of a public school system, predicated on the proposition that once children are served educationally according to state criteria, they may be educated at public expense with religious indoctrination, violate the prohibition against establishment of religion found in the First Amendment to the United States Constitution?

(6) Does the Supreme Court distinguish between the use of public funds to reimburse parents for the costs of transportation of their children to church schools and the use of public funds to set up a system of public transportation to and from, or part way to and from, church schools so as to find the latter unconstitutional under the religious clauses of the First Amendment to the United States Constitution?

(d)

STATEMENT OF THE CASE

The appellants filed a "complaint" in the Court of Common Pleas of Montgomery County, Pennsylvania, August 30, 1965, complaining that School Directors of Abington Township proposed to and had agreed to provide transportation to church schools as authorized by a Pennsylvania law adopted on June 15, 1965 amending the "Public School Code of 1949." The budgetary provision for the transportation of school pupils for the school year beginning July 1, 1965 was increased by $10,000.00 in order to provide funds for the transportation of the church school pupils.

The plaintiffs asked the Court of Common Pleas to adjudge Act No. 91 of June 15, 1965 unconstitutional as repugnant to the United States Constitution, and to enjoin the School District of Abington Township from implementing the act and expending public funds on it. The complaint alleged that the act violates the religious clauses of the First Amendment and the Fourteenth Amendment to the Constitution of the United States.

The Commonwealth of Pennsylvania and certain individuals, parents of children attending church schools, intervened as parties in the action. On September 20, 1965 the School District and the Commonwealth of Pennsylvania filed their answer admitting the proposed expenditures and requesting that the complaint be dismissed or that judgment be entered in favor of the defendants.

On September 28, 1965 the Attorney General of the Commonwealth of Pennsylvania filed a petition for special Writ of Certiorari to the Pennsylvania Supreme Court. The petition was granted February 7, 1966. This case, and a

case filed September 1, 1965 in Delaware County against the School Directors and Officers of Rose Tree Union School District were heard together. The Supreme Court of Pennsylvania dismissed the complaints by an opinion filed January 17, 1967. By five separate opinions the Pennsylvania Supreme Court upheld the constitutionality of the Pennsylvania Act No. 91 of June 15, 1965 by a five to two majority, two justices dissenting.

HOW THE FEDERAL QUESTION IS PRESENTED

The question of the constitutionality of the Pennsylvania statute, Act No. 91 of June 15, 1965, was raised in the complaint (Paragraph 19, E and F—Complaint). The opinion of the court below held: "We here hold that Act 91 does not offend against the First or Fourteenth Amendment to the Constitution of the United States." (Appendix A Page 16a.)

The appellants filed notices of appeal in the appropriate courts in Pennsylvania on April 10, 1967. A petition for a *writ of certiorari* to the Supreme Court of Pennsylvania was filed April 24, 1967 in *Worrell v. Matters*, Case #1318 in the Supreme Court of the United States which case was heard by the Pennsylvania Supreme Court together with this case and one opinion covers both.

(c)

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

The federal questions raised by this case relate to the constitutionality of a state law requiring [illegible]

—it desirable as such education may be—is contrary to the principle of separation of church and state developed in the First Amendment to the Federal Constitution as interpreted by this court. The limitation on the Federal Government's power to use tax funds for church purposes, implicit in the religious clauses of the First Amendment, similarly prohibits the use of State funds. Justice Black in *Gideon* v. *Wainwright*, 372 U. S. 335 at 341 points out:

> "Explicitly recognized to be of this 'fundamental nature' and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition for redress of grievances."

In *McGowan* v. *State of Maryland*, 366 U.S. 420, Mr. Justice Frankfurter reminded:

> "The general principles of church-state separation were found to be included in the Amendment's Due Process Clause in view of the meaning which the presuppositions of our society infuse into the concept of 'liberty' protected by the clause. This is the source of the limitation imposed upon the States." (480).

Bending to "sectarian pressures" for state support for private church schools, the Pennsylvania Legislature passed Act No. 91, June 15, 1965, which provides that

> "Where provision is made by a board of school directors for transportation of resident pupils to and from the public schools, the board of school directors shall also make provision for the free transportation of pupils who regularly attend nonpublic elementary and high schools not operated for profit."

Edward C. Rhoades and others filed a suit in equity in Montgomery County, averring that Act No. 91 was unco-

ful and unconstitutional under both the State and Federal constitutions. The Attorney General of Pennsylvania intervened. In addition to the issues under the State Constitution,

"the plaintiffs and those who support their position see in Act 91 an infringement on the First Amendment to the Federal Constitution . . ." (Appendix A p. 2a.)

The proponents of Act 91 see it as an act

"for the health, welfare and safety of the children of the Commonwealth."

The following constitutional provisions are involved:

Amendment I — U. S. Constitution

Amendment XIV — U. S. Constitution

The federal question thus involves a determination of whether the furnishing of bus transportation at public expense to a limited class of church school students tends to establish religion as forbidden by the First Amendment to the United States Constitution. Mr. Justice Black in *Everson v. Board of Education* (330 U.S. 1, 15) carefully explained the scope of the establishment clause of the First Amendment:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect [illegible]

The *Everson* opinion has been praised for its delimitation of the "establishment clause" and criticized for its application of that principle to the facts of that case. Although both cases are bus transportation cases, *Everson* can be distinguished from the present case on the facts.

The opinion in the present case is obviously incompatible with the principles of separation of church and state found in the First Amendment to the United States Constitution. For one example, from the opinion, the Pennsylvania court stated:

> "Despite the wondrous flexibility of the English language it is still difficult to see how one can conclude that placing children on a school bus establishes a religion. And even if the children are transported to a school which, in addition to teaching state-approved subjects, offers guidance in the world of faith, this still does not establish a religion." (Appendix A p. 4a.)

The Pennsylvania court further states:

> "Where children are involved, the laws of the Commonwealth and the decisions of our Courts make no distinction between public school and nonpublic school pupils." (Appendix A p. 7a.)

This novel principle when applied to church schools would eliminate the principle of separation of church and state from the important field of the education of the young. This example of the "child-benefit" theory would completely empty the establishment clause of the First Amendment of any effective limitation on the union of church and state for religious education.

The Pennsylvania court in its opinion relies on this discredited "child-benefit" theory to overcome federal con-

stitutional objections to the use of public moneys to provide bus transportation to bring students to and from church schools. The "child-benefit" theory had its birth in 1930 in *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370. That opinion was not in a first amendment but in a "due process" case. The theory is not applicable to cases, like the present, which raise the question of the unconstitutional establishment of religion. To support sectarian religious schools with state funds is clearly an unconstitutional establishment of religion even though the activities involved are clearly of benefit to children. This would be true in the use of state funds to maintain churches by transporting children to Sunday School.

The applicability of the "child-benefit" theory to establishment cases under the First Amendment to the United States Constitution is thus raised in the present case. It is believed that this court will limit the "child-benefit" theory to situations where the benefit to the child is not a benefit which it is a function of a church or church school to provide in carrying out its self-appointed task. It is believed that this court can reaffirm that:

"Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person." *Zorach* v. *Clauson*, 343 U.S. 306, 314.

Or, as Justice Douglas pointed out in his concurring opinion in *Engel* v. *Vitale*, 370 U.S. 421, 1962:

"There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largess." (emphasis supplied). (444)

(f)

THE GENERAL IMPORTANCE OF THIS PARTICULAR CASE

It would be presumptuous of the appellants to belabor the importance of this particular case. A carefully worded opinion by the Supreme Court which points out that the public taxpayer may not be called upon to directly or indirectly finance churches or their schools, through the supplying of a transportation system, will guide the public and the private church school officials to strengthen their systems without compromising sound church-state relations established in the First Amendment to the United States Constitution. The opinion of the Supreme Court of Pennsylvania will, if followed, lead to a widespread breakdown of that complete separation between the state and religion required by the Federal Constitution. In *Torcaso* v. *Watkins*, 367 U.S. 488 Justice Black quotes:

> "We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church' . . . We renew our conviction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.'" (494.)

This particular case involves the survival of the public school system, the health and spiritual strength of the church school systems, and the continuation of religious freedom in our pluralistic society. A careful decision will be a strong rock in the "wall of separation" between church and state on which all our civil rights ultimately depend.

We recommend the words of Chief Judge Prescott of the Maryland Court of Appeals who in *Horace Mann League*

v. *Board of Public Works* (212 Md. 645, 120 A2d 51 at p. 60) stated:

"... the problem to be considered and solved when the First Amendment was proposed was not one of hazy or comparative insignificance, but was one of blunt and stark reality, which had perplexed and plagued the nations of Western Civilization for some 14 centuries, and during that long period, the union of Church and State in the government of man had produced neither peace on earth, nor good will to man."

CONCLUSION

The questions presented by the Appeal are substantial and of general and public importance. Probable jurisdiction should be noted.

Respectfully submitted,
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APPENDIX A

OPINION OF THE COURT

MUSMANNO, J. FILED: January 17, 1967

The Act of June 15, 1965,[1] amending Article III, Section 1361 of the Public School Code of 1949,[2] provides, inter alia:

> "When provision is made by a board of school directors for the transportation of resident pupils to and from the public schools, the board of school directors shall also make provision for the free transportation of pupils who regularly attend non-public elementary and high schools not operated for profit."

On August 30, 1965, Brenard G. Rhoades and five others filed a suit in equity in Montgomery County, averring that the Act of June 15, 1965, known as Act No. 91, was unconstitutional, unlawful and invalid, and asking that the Court enjoin the defendant School District of Abington Township from entering into any contract under the indicated legislation.

On September 1, 1965, Betty J. Worrell filed a similar suit in Delaware County against the School Directors and Officers of Rose Tree Union School District. The Attorney General of the Commonwealth petitioned this Court to take original jurisdiction in the two equity actions and we issued certiorari to bring the actions before us for disposition. The Attorney General intervened in both actions, as did other parties, all of whom filed answers and briefs. All counsel

1—Act No. 91, P.L. ..., 24 P.S. §13-1361.

2—Act of March 10, 1949, P.L. 30, 24 P.S. §13-1361.

participating in this argument, both orally and by printed brief, have presented their positions ably and vigorously.

The issue is one on which adversaries feel deeply, although in reality the opposing points of view do not bristle with as much contention as might at first appearance seem likely. The plaintiffs and those who support their position see in Act 91 an infringement on the First Amendment to the Federal Constitution and to Article I, Sec. 3; Article III, Sections 17 and 18; and Article X, Sections 1 and 2 of the Pennsylvania Constitution.

The purpose of Act 91, as announced in its title, is to provide for the "health, wealth and safety of the children of the Commonwealth." The phrase "health, wealth and safety" is not to be treated lightly or as a superfluity. "The Legislature cannot be deemed to intend that its language be superfluous and without import." (*Daly v. Hemphill*, 411 Pa. 263.)

The larger number of schools in Pennsylvania are located so far away from the homes of the pupils who attend them that the pupils are required either to walk long distances or to make use of vehicular transportation. In recent years the foot traveler, because of the volume of motor traffic which moves and exists in approaching the grim appearance of a foreign invader, is in constant jeopardy of death or physical disablement, as he proceeds, warily or carefreely down the highways of the nation. And those who ride in private cars can never be certain, because of the ever-increasing violence and number of collisions, that they will

2—To avoid a cumbersome pleading, wholly unnecessary in the disposition, because the suit filed in Montgomery County and the one filed in Delaware County, the parties agreeing for the uncontroverted ruling [illegible] will be called in this opinion, the plaintiffs.

arrive at their destinations with only the aliments they enjoyed when they started on their journeys.

Testimony before a United States Senate Committee advanced the dire prediction that:

"It seems probable that over the next 5 years we will kill on the highways of this country virtually people as we lost to enemy action in all four years in World War II. In the next decade, we can expect to kill more than 500,000 people and injure about 40 million." (89th Cong. 2d Sess. 112 Cong. Rec. 6576.)

In view of the peril hovering over our streets and roads like a miasmatic fog, those charged with concern for the safety of children are duty bound to devise methods and means for saving the little travelers from harm on their way to and from school. Obviously the manner in which to provide these youthful wayfarers with a fair measure of protection against highway mishap is to keep them pedally off the roads and to transport them in vehicles so formidably constructed that they may ward off and parry, to the maximum extent possible, aggression from other vehicles. The school bus with its large heavy wheels and steel fabricated body seems to be the answer to the worrisome problem. Pennsylvania Secretary of Public Welfare, in testifying on House Bill 381 (later to become Act 91) before the Senate Education Committee, said:

"... school bus transportation clearly involves the ... safety and health of our children. The hazards ... school children on the daily journeys to and from ... roads of the countryside and of public highways ...

gers occasioned by exposure to weather, against evils of child-molestation."[4]

He stated further that "with respect to injuries," a person is five times as safe in a school bus as in a car. With respect to death, a person is ten times as safe in a school bus as in a car." In support of this statement, he cited statistics: "In 1963, there were 2.3 deaths, per 100,000,000 miles, in cars, as compared to .2 deaths per 100,000,000 miles in school buses."

The need for the collective motorized transportation of school children is thus as apparent as a washed-away bridge. The opponents of Act 91 do not contest the desirability, indeed even the imperativeness, of transporting children to school by means of school buses, but argue that they may not be used to ferry children attending nonpublic schools which, of course, include parochial schools. They point to the First Amendment to the Constitution of the United States which declares, inter alia, "Congress shall make no law respecting an establishment of religion,"[5] and argue that Act 91 offends against it.

Despite the wondrous flexibility of the English language it is still difficult to see how one can conclude that, placing children on a school bus establishes a religion. And even if the children are transported to a school which, in addition to teaching state-approved subjects, offers guidance in the

4—Hearings before Senate Education Committee 14-16 (March 24, 1965).

5—The Supreme Court of the United States has held that the First Amendment has been made wholly applicable to all the States by the Fourteenth Amendment. (*School District of Abington Township v. Schempp*, 374 U.S. 203).

world of faith, this still does not establish a religion. Our whole body of school law is predicated on the proposition that once children are served educationally according to State criteria, their extra-curricular activities cannot adversely affect the State, constitutionally. Indeed, the Pennsylvania School Code specifically embraces the concept of nonpublic schools, the title explaining that the law relates to "the public school system, including certain provisions applicable as well to private and parochial schools."

In his concurring opinion in the case of *McGowan v. Maryland*, 366 U.S. 420, 467, Justice Frankfurter said:

> "It was on the reasoning that parents are also at liberty to send their children to parochial schools which meet the reasonable educational standards of the State . . . , that this Court held in the *Everson* case that expenditure of public funds to assure that children attending every kind of school enjoy the relative security of buses, rather than being left to walk or hitchhike, is not an unconstitutional 'establishment', even though such expenditure may cause some children to go to parochial schools who would not otherwise have gone."

Pennsylvania State laws compel all children up to 18 years of age to attend school—not public school, but *any* school so long as it teaches an approved curriculum and meets other State requirements. The State awards to nonpublic school students the same scholastic credits as those which are earned by public school students. It would be grossly illogical, therefore, to say that the State which does not differentiate between public and nonpublic pupils, so far as grades, promotion, and graduation are concerned,

cleaves a line of distinction between them according to whether they arrive at the school on school buses, in private motor cars or on foot.

Not only do law and reason refute any such differentiation, but economics in good government dispels the concept. The huge budgets required to maintain our public school system is a matter of concern to everybody. The imperative need for the best in education for the youth of our Commonwealth convinces the civic-minded citizens of the inevitability of heavy taxes to meet the expense, but it does not lessen the weight of the financial burden he must carry. Therefore, any procedure which may lighten that burden, consistent with maintaining the highest State educational standards, is warmly welcomed by the taxpayers. Thus, for every nonpublic school pupil picked up on the road by a public school bus, that much weight is lifted from the back of the taxpayer because the maintenance of non-public schools, of course, does not depend upon public funds.

Nearly one-fourth of the school children in Pennsylvania attend nonpublic (mostly denominational) schools. Since the parents of the children in nonpublic schools still pay public school taxes, without using public school facilities, it has been estimated that the taxpayers, since they are not required to provide teachers, equipment and supplies for the nonpublic school children, are financially benefitted to an amount equal to one-third of the entire educational budget of the Commonwealth.[5] Indeed, if nonpublic schools were

[5] See General Fund Budget Message of Governor William W. Scranton, on February 7, 1968 (6) 1968-1969 BUDGET OF THE COMMONWEALTH OF PENNSYLVANIA (c) "Current Expenditure Per

to be abolished, the increase in tax burden to the citizens of the Commonwealth would be noteworthy and the Commonwealth would be hard put to provide the buildings, teachers and equipment for the flood of additional children released into their care and responsibility.

Where children are involved, the laws of the Commonwealth and the decisions of our Courts make no distinction between public school and nonpublic school pupils. In 1911 the Pennsylvania Legislature enacted a law[7] providing for the establishment of manual training schools for all children, public and nonpublic. It specifically stated that

> "No pupil shall be refused admission to the courses in these additional schools or departments, by reason of the fact that his elementary or academic education is being or has been received in a school other than a public school."

When a 13-year-old pupil of a private school endeavored to obtain this manual training, taught in a public school in Altoona, the school district involved refused him admittance, arguing that the Act was unconstitutional in that it would give "to private and sectarian schools the use of money raised for public schools, contrary to Article IX, Sec. 7 and Article X, Sec. 2 of the State Constitution. The Act specifically stated that the manual training school was to be "an integral part of the public school system in such district." Despite this language which went much further in linking public and private schools in an educational undertaking

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Pupil, Average Daily Membership for Selected Stats", 1965-1966, Table 17, p. 20, Volume 4, SELECTED EDUCATIONAL STATISTICS, Bureau of Statistics, Department of Public Instruction, Commonwealth of Pennsylvania (1966).

7—S. C. 401, Act of May 18, 11, P.L. 309.

than Act 91 here being discussed, our Court held that the Act was constitutional, stating:

> "The benefits and advantages of these additional schools and means of education and improvement are not restricted to the pupils in regular attendance at the elementary public schools and pursuing the entire prescribed elementary schools, but are intended to be free to all persons residing in such district' . . ." (*Comm. v. School District of Altoona*, 241 Pa. 224.)

If the pupil of a private school may attend a manual training school, which by law has become part of the "public school system", certainly he may not under the present law, be excluded from a bus which in itself, stationary or mobile, is not a classroom for instruction.

The Public School Code provides for children, without distinguishing between public and nonpublic schools, many facilities, as, for instance, medical, dental and nurse services (Section 14-1401 et seq.); driver safety (Section 15-1519); food and milk supply (Section 13-1335); board and lodging (Section 13-1367), tuition and maintenance of blind, deaf and cerebral palsied children (Section 13-1376). The School Code provides that school district funds may be used for traffic safety purposes:

> "The board of directors of any school district acting alone or with another district or districts, may contribute funds to another political subdivision for the erection and maintenance of stop and go signal lights, blinkers or other like traffic control devices." (1949, March 10, P.L. 30, Art. V, Sec. 525, added

1965, Dec. 1, P.L. ....., No. 369, Sec. 1, 24 P.S. Sec. 5-526).

On the basis of logic and sustained reasoning it would be absurd to allow nonpublic school children into all these public services but deny them a ride on a bus to attend a school conforming to the requirements of the State educational program.

But the plaintiffs in the Montgomery County case argue that Act 91 is unconstitutional because five of the schools that educate children riding the school buses are owned and operated by the Roman Catholic Church and that, therefore, the plaintiffs contend,

> "a primary and direct effect of the expenditures necessary or reasonably attendant upon such maintenance and operation is to advance the Roman Catholic Church, the particular local Roman Catholic Churches, and the religion thereof."

This same argument was pressed in the case of *Everson v. Board of Education*, 330 U.S. 1, where the constitutionality of a New Jersey statute was attacked because it authorized reimbursement to parents for fares paid for transporting by public carrier children attending public and Catholic schools. The Supreme Court of the United States ruled that the statute did not offend against the Federal Constitution:

> "... we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public *and other schools*. It is undoubtedly true that children are helped to get to church and schools. There is

even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment." (Emphasis supplied.)

The United States Supreme Court found that the parochial schools there under consideration met New Jersey's school requirements. The State contributed no money to these schools; it did not support them. The legislation which provided for the busing of the parochial children did "no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." Therefore, the law was not at odds with the First Amendment. The same is true of Pennsylvania's Act 91. In its discussion the Supreme Court referred to the case of *Pierce v. Society of Sisters*, 268 U.S. 510. There, the State of Oregon had passed a law requiring parents, under penalty of punishment for disobedience, to send their children to public schools. The Supreme Court held that such a law constituted an unreasonable interference with the liberty of parents and so violated the Fourteenth Amendment. The Court said:

> "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." (p. 535).

Commenting on the *Pierce* case, the Supreme Court said in the *Everson* case:

> "Parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has the power to impose." (p. 18)

The Supreme Court also pointed out that the First Amendment, in addition to abjuring the establishment of religion, also declared that there must be no prohibition in the "free exercise" of religion. Thus, while government may not use a legislative tool to build a church, neither may it employ a parliamentary bulldozer to demolish a church already constructed. "The prohibition that the State may not offer aid to the institution of religion, applies just as strongly in the other direction, that is, it may not offer harm to religion." (Everson, supra, p. 18)

Religion is part of the American way of life. Beginning with the landing of Columbus on the shores of San Salvador when the Genoese navigator offered prayers of gratitude to God for the faith which sustained him in the preparation for, and the perilous achievement of, his hazard-laden voyage, continuing through the Mayflower Compact which is headed by the solemn and sacred words: "In the name of God Amen!" and calls upon the Deity for guidance and support in the new life to begin on the American continent, carrying on through the Declaration of Independence and the Constitution of the United States in their reverent supplication to a Supreme Being, and standing fast in State papers and the pronouncements of our Presidents, religion is inseparable from the history of the United States. The United States Supreme Court said in the case of *Abington School District v. Schempp*, 374 U.S. 203, 213:

> "This background is evidenced today in our public life through the reference to our coins, our currency, the Pledge to the Allegiance of the flag, and our National Anthem. Likewise each House of the Congress provides through its

> Chaplain an opening prayer, and the sessions of this Court are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God. Again, there are such manifestations in our military forces, where those of our citizens who are under the restrictions of military service wish to engage in voluntary worship. Indeed, only last year an official survey of the country indicated that 64% of our people have church membership. Bureau of Census, U. S. Department of Commerce, Statistical Abstract of the United States, 48 (83d ed. 1962), while less than 3% profess no religion whatever. Id., at p. 46. It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are 'earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his . . . blessings . . .'"

Even Justice Rutledge, writing the dissent in the *Everson* case, acknowledged that:

> "Our constitutional policy . . . does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise." (p. 52)

Every daily session of the Courts of this Commonwealth open with the adjuration: "God save the Commonwealth and this Honorable Court." Each witness who takes an oath in all our Courts is required to avow that he will tell the truth, the whole truth, and nothing but the truth, for which he will answer "on the last Great Day." At

patriotic ceremonies where the national anthem is sung, the citizens lift their voices to the words: "This be our motto 'In God Is Our Trust'." The Pledge of Allegiance to the Flag of the United States proclaims "One Nation under God."

The constitutional prohibition against the establishment of religion was never intended to deny the free exercise of religion. Thomas Jefferson, who penned the Declaration of Independence, and who also wrote Virginia's Bill for Religious Liberty, proclaimed the omnipotence of the Author of the Universe.

> "Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plans of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . ."

Any interpretation of legislation, therefore, which would deny the former voluntary freedom in religious worship would not only be contrary to these American historical expressions of faith, but would also offend against the First Amendment with its full-throated proclamation of religious freedom. It was because the Founding Fathers foresaw the possibility of forces and influences working to destroy the faith of man in a Supreme Being that they made the free exercise of religion part of the same setting of the pendulum which prohibits the establishment of a state religion.

In [illegible], 343 U.S. 306, the Supreme Court

"The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. . . . We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. . . . We find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

From this same pulpit of American historical exposition, the Supreme Court declared in *Everson*:

"... New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, because of their faith, or lack of it, from receiving the benefits of public welfare legislation."

Act 91 is public welfare legislation and, from the reservoir of public welfare, all races and religions may drink unimpededly in the quenching of normal thirsts. Indeed one of the fundamental reasons for the State in a civilized society is to provide for the public welfare.

[illegible] cast in the law of the land, and rules squarely against the contentions of the plaintiffs in the Courts below as far as the Federal Constitution is concerned. Our own Courts uphold the *Everson* case by name

in 1956 in *Schade v. Allegheny County Institution District*, 386 Pa. 507. In that case an attempt was made to declare unconstitutional the Juvenile Court Law of Allegheny County of June 3, 1933, P. L. 1449, and the County Institution District Law of June 24, 1937, P. L. 2017 because they provided for the payment of tax revenues raised by Allegheny County to denominational or sectarian institutions or homes for the board, care and maintenance of neglected or dependent children on order of Allegheny County's Juvenile Court. The complaining plaintiffs argued that these laws violated the Pennsylvania Constitution which prohibits appropriations "to any denominational and sectarian institution, corporation or association." This Court rejected the contention of the plaintiffs that the payments to the denominational or sectarian defendants tended toward "governmental establishment of religion", and, consequently are violative of the Fourteenth Amendment." Mr. Justice Jones, speaking for our unanimous Court, said:

> "It it unnecessary to devote much time to this contention. The Supreme Court has, in principle, settled it adversely to the appellant's position. See *Everson v. Board of Education*, supra, where it was held that a State's use of public tax funds for the transportation of pupils to and from sectarian schools did not serve to promote the establishment of religion."

We here hold that Act 91 does not offend against the First or Fourteenth Amendment to the Constitution of the United States. Does it transgress any provision or provisions of the Constitution of Pennsylvania? We have already [illegible] on certain phases of the State Constitution in con-

nection with a discussion of alleged trespassing on the domains of the United States. We will now examine specifically the argument that Act 91 cannot survive under prohibitory provisions of our own State organic law.

The plaintiffs contend that Act 91 violates Art. I, Sec. 3 of the State Constitution:

> "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences, no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship."

The Abington Township brief asserts precisely that Act 91—

> "compels all the real property owners of the Township to support places of worship and to maintain a particular religious ministry against their consent; and (2) it gives preference by law to certain religious establishments and modes of worship."

These assertions are so feeble of merit that they must fall in the slightest breeze of analysis. When the Constitution of 1874 was being debated in convention, no reference was made to the subject of pupil transportation. Supporting a place of worship meant providing funds for the maintenance of a church. The phrase certainly could not have referred to motor transportation. The concept of a horseless

buggy was as unimaginable in 1873, as walking on air 150 miles above the earth was inconceivable in 1946. The first automobile to awe human beings, excite communities and startle animals did not honk a horn or turn a wheel until 1892. Thus, it can be stated with historic conclusiveness that the framers of the 1874 Constitution could not have had in mind a prohibition against motor transportation for children when they declared that no citizen of the State should be required to support a place of worship.

Even in quixotic imagination, a school bus cannot be regarded a place of worship. The general gayety, levity and juvenile frivolity which prevails among children riding any transportational vehicle rules out the solemnity of a place of worship. Nor can transporting a child to a church-connected school be regarded as supporting a place of worship. The purpose of the school bus is to take children to a structure where they will receive a secular education. Thus the bus serves a secular, public purpose, and as stated in *Everson*, "it is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose."

The fact that the parochial pupil, in addition to receiving a secular education, is offered religious guidance, cannot take away the public nature of the curriculum he studies—a curriculum drafted and supervised by the State. The Supreme Court explained in *Everson* that "it does not follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program."

The plaintiffs' assertion that Act 91 "gives preference by law to certain religious establishments and modes of wor-

ship" is self-defeating on its face because there is nothing in the Act which speaks of preference for nonpublic schools. Indeed the Act states that the buses on which the nonpublic school pupil may ride "shall be over established public school routes." Thus, while nonpublic students eventually reach the nonpublic school, there is no provision that the bus is to take them to the doorstep of that school, or that the bus will pick them up at their homes. So far as nonpublic school children are concerned, they must, in a universal Mohammed sense, go to the buses rather than that the buses come to them.

It is also to be noted particularly that Act 91 makes no special provision for parochial schools. It applies all-sweepingly to children attending nonpublic schools, whether those schools have an association with a church or not. In addition, it is significant that the nonpublic schools will not be the donee of funds or busing facilities, nor will they have any control over them.

The plaintiffs do not charge that nonpublic schools would, under Act 91, be the recipient of financial benefits. But even if this were to be an indirect result of the legislation, this fact in itself would not unconstitutionalize the law. In order to come within the constitutional ban, financial benefits accruing to a nonpublic school would have to be direct and not merely incidental, supplemental or peripheral. In *Gallatizin Borough School District*, 164 Pa. 629, the complaining party sought to enjoin a school district from employing as teachers members of a religious order who contributed all their earnings, above their maintenance, to the religious order of which they were members. This Court rejected the complaint, stating through the scholarly Justice Dean, that:

"It is none of our business, nor that of these appellants, to inquire into this matter. American men and women, of sound mind and twenty-one years of age, can make disposition of their surplus earnings as suits their own notions. We might as well, so far as any law warranted it, inquire of a lawyer, before admitting him to the bar, what he intended to do with his surplus fees, and make his answer a test of admission. What he did with his money could in no way affect his right to be sworn as an officer of this court, therefore it would be impertinence for us to inquire."

The plaintiffs find in Act 91 a violation of Article 3, Section 18 of the Pennsylvania Constitution, which reads, inter alia:

"No appropriations shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association."

In *Schade v. Allegheny County Inst. District*, supra, we affirmed the statement of the Court of Common Pleas of Allegheny County that:

"The cost of the maintenance of neglected children either by the State or the County is neither a charity nor a benevolence, but a governmental duty."

Educating the children of the state is a governmental duty, and, if sectarian distance builds a wall around the place of education, government must level that wall.

Moreover, Act 91 does not require any appropriation from the Commonwealth. In fact, the Abington Township School District admits this in its brief:

> "The draftsmen of the Act No. 91 of June 15, 1965, drew it so that the appropriations are and will be made, not by the General Assembly, but by instrumentalities thereof (school boards). Further, the Act is drawn so that no money passes directly from the state or from its instrumentalities into the treasury of any sectarian institution."

Although Abington cites the *Schade v. Allegheny County Inst. District*, supra, in support of its contentions, we have seen that it is a sword against those contentions rather than a shield for it. Our Court ruled that the payments made to the institution supporting neglected children is "in legal effect payments to the child." The school buses under Act 91 are operated for the benefit of the children who ride it and not for the benefit of the church which may be associated with the school in which the children receive a State-supervised education.

A public fire department is maintained by the taxes of the people, but no one would be so shortsighted as to argue that firemen had no duty to extinguish a conflagration which was consuming a church, no matter what the denomination. Policemen are assigned to duty at and about churches but no one would say that this is an illegal assignment of duty. Churches and religious establishments, regardless of creed, form part of the whole mosaic of our civilized society and should, and do, receive the protection of the State of their physical properties. "The Constitution does not prohibit the State or any of its agencies from doing business with

denominational or sectarian institutions, nor from paying just debts to them when incurred at its direction or with its approval. Numerous cases can be readily visualized where such situations have occurred: i.e. payment of the bill of an injured employee to a sectarian hospital." (*Schade v. Allegheny County Inst. Dist.*, supra, p. 512).

The Abington brief cites Article 10, Section 1 of the State Constitution:

> "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years may be educated . . ."

and argues that this destroys the constitutionality of Act 91. It does not even approach within firing range of Act 91. The constitutional provision in question mandates the Legislature to provide for the establishment "of a thorough and efficient system of public schools," but it does not say that there may not be schools supplemental to those supported by the State. If this constitutional provision prohibited the creation or existence of other schools, then every private school in the State would have to be dismantled, which, of course, would be absurd.

Section 2 of Article 10 states that:

"No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school."

Abington sees in this section another bulldozer crushing out the life of Act 91, but Abington itself throws the bulldozer off its track with its own statement, namely,

> "One section of the Public School Code, viz., sec. 1401, relating to school health services, does extend to children in private schools and results in public expenditures for the benefit of all children of school age, whether they attend public or private schools. Of course, the health of all children residing within the Commonwealth is a matter of legitimate concern of the General Assembly . . . Programs such as health and dental examinations for all children of certain ages are unrelated to the 'support of any sectarian school'."

Indeed, under existing law, children in sectarian schools receive tax-supported health services. (Act of July 15, 1957, P.L.; Sept. 29, 1961, P.L. 1743; 24 P.S. 14-1401 et seq.)

If the health of *all* children in the Commonwealth is a matter of legitimate concern of the General Assembly, why would not their safety also be a matter of legitimate concern of the General Assembly? As already quoted, Arlin M. Adams, the Pennsylvania Secretary of Public Welfare, said:

> "The busing of school children is for their protection against hazards of the roadways and of traffic, against dangers occasioned by exposure to weather, against evils of child molestation."

If the General Assembly can act and appropriate to save children from the onslaughts of diphtheria, smallpox and other infection diseases, is it impotent to protect them from the pneumonia-provoking blasts of winter, the mangling fenders of a drunk-driven automobile, and the lecherous advances of the depraved molester?

We have seen that the bus transportation authorized by Act 91 must traverse routes which lead to public schools. Are parochial children on these routes to be left to the mercies of inclement weather, culpably negligent drivers and children disturbers? In not a few instances the school buses picking up only public school children travel with many empty seats. Is a nonpublic school child to be denied a seat in an unfilled bus, leaving him to plod the weary miles on foot? With such school buses on the road, expending no extra gasoline to pick up nonpublic school children, are they to return home and ask their parents for private transportation beyond their means to supply?

In all the briefs which have been filed in opposition to Act 91, there is not one statement or word remotely suggesting that the transportation of nonpublic school children will in the slightest be deleterious to the public, the individuals involved, or the educational program of the State. On the contrary, we have seen how this school busing will be protective of the health and the safety of the children. In addition, such busing will be salubrious and educational for the children in that public and nonpublic school children will mingle, converse and soon learn that children are the same everywhere. These youthful riders, regardless of religious attachments, speak the same language, salute the same Flag, play the same games, laugh at the same jokes, entertain the same love for their respective parents, and demonstrate the same devotion to the ideals of our country. All this comes under the canopy of preserving the health, welfare and safety of the children, one of the most fundamental responsibilities of the State, and specifically provided for in the Public School Code of the State.

Paradoxically, the plaintiffs argue that Act 91 goes too far and then, that it does not go far enough. They complain that the statute does not provide for transportation of children who live close to their schools. But if the school is close enough to walk to, why must there be vehicular transportation? Sufficient to a trip is the distance thereof.

Then the plaintiffs say that students attending private schools for profit are omitted from the statute. In cases of private schools where education is imparted, on a profit basis, it can be assumed that if the parents or guardians can afford expensive special tutoring for their children, they can afford to provide private safe transportation for their children.

The brief filed in behalf of the plaintiff in the Delaware County case complains that "nonpublic school children who do not live near an established bus route will still face the same traffic hazards as they did before." The obvious answer here is that if these students are confronted with such dangers as will justify extending the scope of the Act, the General Assembly can provide for that extension, but it is no reasonable argument to say that because a statute does not make provision for a hypothetical minimal hazard, it should ignore a proved multiple peril.

This same brief argues that there is no analogy between bus transportation and the provision for lunches and medical care for nonpublic school children, specifying: "Lunch and medical care are things which a child must have, irrespective of whether or not he attends school." In our society it is accepted that food for the mind in the form of education is no less necessary than food for the stomach. With regard to medical care, the supplying of bus transportation may be

the means of protecting children from illness-producing exposure which would lessen the need for medical care.

It was also argued before us that Act 91 will "accelerate the fragmentation of our society and increase religious conflicts." The exact reverse is true. The closer different religions get to one another, the less will be the reason for dissension. We can take judicial note of the fact that in recent years noble efforts have been made in establishing inter-faith councils, leading to the hope fulfillment of wiping away antagonisms between different churches and beliefs. Bringing children together in buses on their way to the temple of learning can only help to hasten the eventual attainment of the true brotherhood of man. The friendships made by children as they travel side by side and in conversational intimacy, to and from school and home, in the most formative years of their lives, will grow stronger with the passing of the years, increasing the mutual understanding which is the most potent welder in a common cause for peace and happiness.

Finally, the plaintiffs argue that Act 91 is unconstitutional because of "vagueness." The only thing vague in this entire situation is the charge of vagueness advanced by the plaintiffs. It is like a splash of rain that has no target and leaves no durable impression. A reading of Act 91 will reveal its stark simplicity, specificity and secularization. It has but one aim and that is to place nonpublic schools, in the matter of student transportation, in the same classification as public schools, so long as the nonpublic schools observe the public school curricula. There is nothing in either the Federal or State constitution, the laws of the Commonwealth, or in fundamental justice to prohibit so salutary an objective.

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The Complaints in the courts below are dismissed, each party to pay own costs.

Justice Jones files a concurring opinion.

Justice Roberts files a concurring opinion in which Justices Jones, Eagen and O'Brien join.

Chief Justice Bell files a dissenting opinion.

Justice Cohen files a dissenting opinion.

CONCURRING OPINION

ROBERTS, *J.* FILED: January 17, 1967

The thrust of plaintiffs' attack on the Act of June 15, 1965, P.L. , 24 P.S. §13-1361 (hereinafter referred to as Act 91) is that it violates the separation of church and state mandated by the Constitution of the United States and that it violates various provisions of the Constitution of Pennsylvania. I concur with view, shared by all but one member of this Court, that the *Everson* case forecloses this Court from holding that the statute violates the federal guarantee of separation. It is also my view that, even admitting that the statute will require the expenditure of additional funds for the bussing of school children, Act 91 does not violate the Constitution of Pennsylvania.

In asserting their challenge to the Constitution of Pennsylvania, the plaintiffs have invoked no less than the six following provisions of our constitution:

Article I, §3:

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

Article III, §17:

No appropriation shall be made to any charitable or educational institution not under the absolute control of the

Commonwealth, other than normal schools established by law for the professional training of teachers for the public schools of the State, except by a vote of two-thirds of all the members elected to each House.

Article III, §18:

No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association: Provided, that appropriations may be made for pensions or gratuities for military service and to blind persons twenty-one years of age and upwards, and for assistance to mothers having dependent children and to aged persons without adequate means of support, and in the form of scholarship grants or loans for higher educational purposes to residents of the Commonwealth enrolled in institutions of higher learning, except that no scholarship grants or loans for higher educational purposes shall be given to persons enrolled in a theological seminary or school of theology.

Article IX, §7:

The General Assembly shall not authorize any county, city, borough, township or incorporated district to become a stockholder in any company, association or corporation, or to obtain or appropriate money for, or to loan its credit to, any corporation, association, institution or individual.

Article X, §1:

The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose.

Article X, §2 :

No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian schools.

A harmonious reading of these six provisions forces me to an observation which I deem crucial to the setting in which the plaintiffs' challenge must be considered: Although Article I, Section 3 and Article X, Section 2 clearly establish a wall of separation between the Commonwealth and religious institutions, the more recently adopted Article II, Section 18[1] seems to contemplate certain instances in which public monies may properly be expended in the course of educational activities having a connection with church-related institutions. The last part of the proviso of Article III, Section 18, suggests to me state constitutional sanction for the payment of scholarship grants for higher education in those church-related institutions not teaching theology. I can see no other reasonable interpretation of Article III, Section 18's specific exclusion of theological schools and its silence on the matter of other programs conducted at institutions of higher learning.

That there are limits to the wall of separation erected by the Constitution of Pennsylvania is a conclusion which is not only required by constitutional language itself, but demanded by the practical realities of life in a modern interdependent community where there must of necessity be many points of contact between the agencies of government and all institutions, whether church-related or not. It is the inevitability of these points of contact which has undoubtedly permitted to exist, without significant successful challenge, the provision of many governmental services—fire, police,

1—Amendment of November 5, 1963.

sewage—which in some sense benefit the conduct of religious institutions. Viewed in terms of hard realities, therefore, it is not the mere benefit to a religion which causes a service provided by government to violate our Constitution.

While provision of a general governmental service, which benefits a church-related institution, may not be for that reason alone unconstitutional, it is clear that for the constitutional language separating church and state to have the vital effect it was meant to have by its authors, there must be some areas and some services which government may not provide to religious institutions. The real difficulty is in gleaning from the sweeping phrases of our constitutional document the place where the line must be drawn.

The defendants in this case, as well as the opinion of the Court in the main rely upon the so-called child benefit theory to draw the line separating the constitutional from the unconstitutional. Given the presumption in favor of the constitutionality of acts of the Legislature[2] and given this Court's duty to accept, unless palpably unreasonable,[3] the Legislature's view as to the reasonable relation of statutes

2—E.g., *Pritchard v. Williston Township School Dist.*, 394 Pa. 489, 493, 147 A. 2d 380, 383 (1959). "An Act of Assembly will not be declared unconstitutional unless it *clearly, palpably* and *plainly* violates the Constitution," *Daly v. Hemphill*, 411 Pa. 263, 271, 191 A. 2d 835, 840 (1963); *Chartiers Valley Joint Schools v. Allegheny County Bd. of School Directors*, 418 Pa. 520, 546, 211 A. 2d 487, 501 (1965); *Milk Control Comm'n. v. Battista*, 413 Pa. 652, 659, 198 A. 2d 840, 843, appeal dismissed, 379 U.S. 3, 85 S. Ct. 75 (1964).

3—*Commonwealth v. Life Assur. Co. of America*, 419 Pa. 370, 214 A. 2d 209 (1965), appeal dismissed, 384 U.S. 268, 86 S. Ct. 1476 (1966); *Loomis v. Philadelphia School Dist. Bdg.*, 378 Pa. 428, 431-32, 103 A. 2d 760, 771 (1954).

to the public health, safety and welfare, I concur in the view that Act 91 is a safety measure whose object is the protection of children from road hazards. I also agree with the Court that such a conclusion is a crucial factor in determining the constitutionality of Act 91. It is my belief, however, that the constitutionality of legislation which benefits directly or indirectly a church-related institution may not be held constitutional merely because it is determined that the purpose or effect of the legislation is the welfare of children or, for that matter, any other proper object of legislative concern. Our Constitution's prohibition of any compelled support of a place of worship, maintenance of a ministry or preference of religion encompasses not only the proscription of financial aids to religion, but also any other governmental action creating special government approval of or involvement with religious activities.[4] And, the background of the Commonwealth's constitutional pronouncements on freedom of religion suggests strongly that prohibition of such aid to religion is, if anything, stricter than the proscription of financial aids.[5] Moreover, for such non-financial governmental involvement or approval to be constitutionally proscribed, a measure need not be as blatantly violative as a statute compelling weekly attendance at a house of worship. Far less overt forms of involvement and association would, in my view also be constitutionally void, and I can imagine measures which, though they arguably come within the child benefit theory, would

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4—See *Gobitis v. Minersville School Dist.*, 21 F. Supp. 581, 584-86 (E.D. Pa. 1937), decree entered, 24 F. Supp. 271 (E.D. Pa. 1938), aff'd., 108 F. 2d 693 (3d Cir. 1939), rev'd., 310 U.S. 586, 60 S. Ct. 1010 (1940).

5—21 Encyclopedia Americana 612-15 (1957 ed.); Buckalew, An Examination of the Constitution of Pennsylvania 5 (1883).

bring government and religious institutions in such close association as to constitute, by virtue of implicit sanction of the government presence, the proscribed "support", "maintenance", and "preference".[6]

Thus what is ultimately persuasive to me in the instant case is not only that Act 91 is a welfare measure, but also the fact that the transportation of students is, in the phrase of *Everson*, "so separate and indisputably marked off"[7] from functions in any sense associated with religion. In other words, though I accept the conclusion that not only actual teaching or religion, but also the conduct of many other programs in parochial schools, is infused with religious significance, it seems to me clear that the process of transporting parochial students in a public bus is so devoid of any psychological, let alone religious, significance, that it does not bring the government into an association with the school which implies the approval or sanction proscribed by our constitution. Indeed, the mere geographical distinctness of the facility being provided out of public funds and church-related institution underscores the lack of involvement of government with religion that Act 91 creates. The simple fact is that Act 91 does not even envision the use of a public facility within the confines of a religious institution; on the contrary, the language of Act 91 suggests that in many instances parochial school students will not even be carried to the doors of their schools.

6—Compare *Hysong v. Gallitzin Borough School Dist.*, 164 Pa. 629, 655-62, 30 Atl. 482, 484-86 (1894) (dissenting opinion). See also *Commonwealth v. Herr*, 229 Pa. 132, 78 Atl. 68 (1910) (per curiam).

7—*Everson v. Board of Educ.*, 330 U.S. 1, 18, 67 S. Ct. 504, 512-13 (1947).

Finally, I think it must be pointed out that the dissenting opinions are incorrect in their view that Act 91 is unconstitutional by virtue of its scheme of classification. It must be remembered that "courts may not question the wisdom of the legislative classification unless there can be found no reasonable ground for it"[8] and that "the reasonableness of the classification made is for the Legislature in the first instance."[9] The Legislature's exclusion of children attending schools operated for profit may have been motivated by a judgment that families of means sufficient to afford such schooling are not, like families of students attending non-profit schooling, deterred by cost from ensuring that their children travel to and from school by a safe method of transportation. I fail to see why that would not be a basis for classification, reasonable within this Court's above mentioned test. As to Mr. Chief Justice Bell's contention that Act 91's exclusion of children attending schools operated for profit reveals it as solely intended to benefit sectarian education, the answer is simple: Act 91 includes not only children attending sectarian schools not operated for profit, but also children attending *non*-sectarian, *non-public* schools not operated for profit.

MR. JUSTICE JONES, MR. JUSTICE EAGEN and MR. JUSTICE O'BRIEN join in this opinion.

8—*Loomis v. Philadelphia School Dist. Bd.*, 376 Pa. 428, 432, 103 A. 2d 769, 771 (1954). *See Commonwealth v. Life Assur. Co. of America*, 419 Pa. 370, 214 A. 2d 209, appeal dismissed, 384 U.S. 268, 86 S. Ct. 1476 (1966).

9—*Loomis v. Philadelphia School Dist. Bd.*, supra note 8 at 431, 103 A. 2d at 771.

CONCURRING OPINION

JONES, *J.* FILED: January 17, 1967

With the result reached by the majority of this Court I am in accord.

It is my opinion that the Act of June 15, 1963, P.L. ....., No. 91, 24 P.S. §13-1361, (amending Article XIII, Section 1361 of the "Public School Code of 1949", Act of March 10, 1949, P.L. 30, 24 P.S. §13-1361), which, "for the health, welfare and safety of the children of the Commonwealth", requires that school districts under certain circumstances provide free transportation for pupils attending nonpublic elementary and high schools not operated for profit, is valid legislation. The principal challenge to such legislation proceeds upon the theory that it is offensive to both the Constitution of the United States[1] and the Constitution of this Commonwealth.[2]

As to whether this statute violates the United States Constitution, the decision of the Supreme Court of the United States in *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504 (1947) is controlling: *Everson* compels the conclusion that the instant statute does not violate the First Amendment. As to whether this statute violates the Constitution of this Commonwealth I am of the opinion that it does not.

In this Commonwealth, the parents and guardians of children are compelled by law to send such children, up to a certain age, to school. In *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571 (1925), the U. S. Supreme Court has

1—Specifically, the First Amendment.

2—Specifically, Article I, Section 3, Article III, Section 18 and Article X, Section 2.

ruled that, if a parochial school meets the secular educational requirements of the state, parents and guardians who send children to such parochial school satisfy the "compulsory education" mandate of the state.

The primary purpose of the instant statute is to insure the safety and the well-being of children, whose parents and guardians are compelled by law to send them to school, while such children are being transported to and from such school, whether the school be public or parochial. The statute constitutes an exercise of the police power of the Commonwealth; its emphasis is upon the welfare and safety of children while they are being transported to and from school and not upon the nature of the school to or from which they are being transported. Its aim is secular, not religious.

The framers of our Constitution contemplated that the church and the state be kept separate and apart and that the state maintain a status of impartiality and neutrality toward all religions and religious beliefs. The instant legislation "neither advances not inhibits religion" in the constitutional sense (See: *School District of Abington Township, Pa. v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560 (1963), but simply provides a method of safe transportation for children while performing the state-compelled duty of attending school.

In my view, neither the U. S. Constitution nor the Constitution of this Commonwealth prohibits or proscribes this statute so vital to the well-being of children pursuing their education.

DISSENTING OPINION

BELL, C. J. FILED: January 17, 1967

Is the Act of June 15, 1965,[1] which amends Article III, Section *1361*, of the Act of March 10, 1949,[2] known as the "Public School Code of 1959," Constitutional *under both the Constitution of the United States and the Constitution of Pennsylvania*? Each of the present actions sought to prohibit the defendant school district's expenditure of public funds for the purpose of furnishing free transportation to pupils attending Catholic and other *nonprofit sectarian schools*, as authorized by the aforesaid amending Act of 1965.

Prior to the aforesaid 1965 amendment to the Public School Code, Section 1361 of the Public School Code provided only that "the Board of School Directors in any school district *may*, out of the funds of the district, *provide for the free transportation of any resident pupil to and from the public schools*[3] . . ."

The Act of 1965 pertinently provides:

"The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:
"Section 1.

"Section 1361, act of March 10, 1949 (P.L. 30), known as the 'Public School Code of 1949,' is amended to read:

"Section 1361. When provided . . .

1—Act No. 91, P.L. ....., 24 P.S. §13-1361.

2—P.L. 30, 24 P.S. §13-1361.

3—Italics throughout, ours, except where underlinings appear in a statute.

"The board of school directors in any school district may, out of the funds of the district, provide for the free transportation[4] of any resident pupil to and from the public schools and to and from any points in the Commonwealth *in order to provide tours* for any purpose connected with the educational pursuits of the pupils. When provision is made by a board of school directors for the transportation of resident pupils to and from the public schools, the board of school directors shall also make provision for the free transportation[5] of pupils who regularly attend nonpublic elementary and high schools not operated for profit. Such transportation provided for pupils attending nonpublic elementary and high schools not operated for profit *shall be over established public school bus routes. Such pupils shall be transported to and from the point or points on such routes nearest or most convenient to the school which such pupils attend* . . ."

In the Amendatory Act of 1965 the Legislature in the clearest language *directed* boards of school directors (in any school districts in this Commonwealth) to use (under certain circumstances) *public funds* for the free transportation of pupils who regularly attend *non-public* elementary and

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4—by school conveyances, private conveyances or electric railways or other common carriers. Section 1362.

5—See also, "Section 2. The amendments made by this act shall not be so construed as to limit or reduce in any way the payments now made by the Commonwealth to various school districts to help defray the cost of transporting pupils and the additional costs incurred by the board of school directors in furnishing transportation under said amendments shall be included in the amounts for which reimbursement may be received from the Commonwealth as now provided by law."

high *schools which are not operated for profit* whenever provision is made by such a board for the transportation of resident pupils to and from the public schools.

The essential averments in the complaints before us are that pursuant to the Amending Act, a school district has agreed to supply, or has appropriated tax money for the purpose of supplying, free transportation to pupils attending *nonprofit schools outside the public school system*. In the Worrell (Delaware County) action it is averred that such transportation will be supplied to pupils attending "sectarian" schools. In the Rhoads (Montgomery County) case, plaintiffs particularize. They aver that in the Abington Township School District there are five nonprofit schools owned and operated by the Roman Catholic Church, that these schools are *sectarian* and are parts of an independent school system maintained by such Church for the teaching and propagation of its particular faith, and that the furnishing of transportation to parochial school children is a necessary function in the operation of such schools.

Plaintiffs contend that the furnishing of free transportation by school districts to children attending sectarian schools constitutes a use of public funds to or is clearly for the benefit of sectarian schools and therefore violates (1) the First Amendment to the Federal Constitution and also (2) (a) Article I, Section 3, and (b) Article III, Section 18, and (c) Article X, Section 2, of the Constitution of Pennsylvania. They further contend that the alleged purpose of the Act,

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6—with provisions and limitations not here pertinent.

viz, protection of the health, safety and welfare of children attending sectarian and nonpetvate schools, *is unjustly discriminatory and is merely a sham and a subterfuge for financial aid to sectarian schools.* For example, *so far as health and safety* are concerned, (1) young children attending private schools are unprovided for, and (2) young children attending public schools and sectarian schools (a) who do not live near an established bus route or (b) who live within a mile and a half of the public or sectarian school they attend, are unprovided for, and (3) young children who have

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7—The Pennsylvania Secretary of Public Welfare, Mr. Arlin M. Adams, testifying at the public hearings before the Senate Education Committee, said: "... school bus transportation clearly involves the safety and health of our children. The busing of school children is for their protection against hazards of the roadways and of traffic, against dangers occasioned by exposure to weather, against acts of child molestation. In 1963, there were 23 deaths per 100,000,000 miles in cars, as compared with .2 deaths per 100,000,000 miles in school buses. With respect to safety, a person is [illegible] in a school bus as in a car. With respect to health, a person is [illegible] in a school bus as in a car." Moreover, except in city, the Act did not require transportation by a bus, although all the parties in their briefs assume the pupils in fact have their transportation will be by [illegible]. Moreover, unlike the [illegible] which [illegible] the Constitution of the State of the Commonwealth [illegible] by the Governor of Pennsylvania (William W. [illegible]) [illegible] January 4, 1965, which [illegible] to provide [illegible] in order to provide [illegible] 167 [illegible] 100 A. 2d 562; [illegible] 167 [illegible] 250.

to cross hazardous city streets near their school in a large city are unprotected and unprovided for.

The principal defense raised by the school districts and also by the Commonwealth is that the "sole purpose and effect" of the 1965 Amendatory Act is to promote the safety, health and welfare of children attending nonpublic, nonprofit schools in the same manner as the safety, health and welfare of children presently attending public schools are promoted, *and a similar protection for children attending private schools is unnecessary and irrelevant.*

The Commonwealth further contends that the fact that the Act is *part of the Public School Code* is of no significance, and the public policy of the Commonwealth has utilized the Public School Code and funds of the school districts as the particular instrument and means for carrying on a wide variety of welfare, health and safety activities some of which have no realistic connection to the support of public schools.

Nearly all of the important facts and factors are agreed upon; the parties differ widely and vigorously upon (1) inferences and conclusions deduced or drawn from the facts, and (2) the correct meaning and interpretation of the pertinent provisions of the Federal and State Constitutions, and (3) the decisions of the Supreme Court of the United States.

Does the Act violate the Federal Constitution?

We start with the fundamental proposition that every Act is presumed to be both valid and Constitutional. *United States v. National Dairy Corporation*, 372 U.S. 29, 32; *Madden v. Kentucky*, 309 U.S. 83, 88; *Highland v. Russell Car and Snow Plow Co.*, 279 U.S. 253, 260; *Home Telephone Co. v. Los Angeles*, 211 U.S. 265, 281; *Sweet v. Rechel*, 159 U.S. 380. Cf. also *Goldblatt v. Hempstead*, 369 U.S. 590, 595-

596; *United States v. Carolene Products Co.*, 304 U.S. 144, 152-154.

The First Amendment to the Constitution of the United States pertinently provides:

"Congress shall make *no law respecting an establishment of religion*, or prohibiting the free exercise thereof; . . ."

Although this clause in the First Amendment clearly constitutes a "religious" restraint *only on Congress*, recent decisions of the Supreme Court hold that the Fourteenth Amendment has made the First Amendment a restraint upon the States as well as upon Congress. *School District of Abington Township v. Schempp*, 374 U.S. 203, and cases cited therein. *Murdock v. Pennsylvania*, 319 U.S. 105, 108; *Everson v. Board of Education*, 330 U.S. 1; *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 210-211; *Zorach v. Clauson*, 343 U.S. 306; *McGowan v. Maryland*, 366 U.S. 420; *Torcaso v. Watkins*, 367 U.S. 488; and *Engel v. Vitale*, 370 U.S. 421.

The above-worded "Establishment" and "Free Exercise" clauses of the First Amendment has generated many different and widely divergent views. To make the law in [illegible] and to [illegible] and to [illegible] the [illegible] and [illegible] [illegible] with [illegible] which

is often thin and shadowy or elusive between the Constitutionally permissible and the Constitutionally impermissible.

So far as the "Establishment Clause" is concerned, I believe the present cases are ruled by the leading case of *Everson v. Board of Education*, 330 U.S., supra, where the facts and issues are strikingly similar. A New Jersey statute authorized district boards of education to make contracts for the transportation of children to and from schools other than private schools operated for profit. A board of education by resolution authorized the reimbursement of parents for fares paid for the transportation by public carrier of children attending public and Catholic schools. The Catholic schools operated under the superintendency of a Catholic priest and, in addition to secular education, gave religious instruction in the Catholic Faith. A district taxpayer challenged the validity under the Federal Constitution of the statute and resolu-

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8—Mr. Justice BRENNAN, in a concurring Opinion, in *Abington School District v. Schempp*, 374 U.S., supra, said (pages 230, 231, 245): "The Court's historic duty to expound the meaning of the Constitution has encountered few issues more intricate [or more filled with emotion] or more demanding than those of the relationship between religion and the public schools. . . . The fact is that the line which separates the secular from the sectarian in American life is elusive. The difficulty of defining the boundary with precision inheres in a paradox central to our scheme of liberty. . . . The case [*U.S. v. Ballard*, 322 U.S. 78, 86] shows how absolute is the line which enforces the Amendment's injunction of strict neutrality, while manifesting no official hostility toward religion. . . ."

9—Mr. Justice RUTLEDGE filed a lengthy dissenting Opinion in which three other Justices joined. In that dissenting Opinion, Mr. Justice DOUGLAS expressly stated in *Engel v. Vitale*, 370 U.S. 421, that [illegible] of the majority in the instant cases, as those questions were presented in that case.

tion, so far as they authorized reimbursement to parents for the transportation of children attending sectarian schools. Without deciding whether the exclusion of reimbursement to parents of children attending private schools operated for profit constituted a denial of the equal protection of the law, the Supreme Court sustained the Constitutionality of the Act and held:

1. The expenditure of tax-raised funds thus authorized was for a public purpose, and did not violate the due process clause of the Fourteenth Amendment; and

2. The statute and resolution did not violate the provision of the First Amendment which was made applicable to the states by the Fourteenth Amendment, prohibiting any "law respecting an establishment of religion."

The Court, in *Everson v. Board of Education*, 330 U.S., pertinently said (pages 14, 16, 17):

"Their decisions, [the decisions of the State Courts] however, show the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion.

"[A state law] cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds in the support of an institution which teaches the tenets and doctrines of a church. On the other

hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.

"Measured by these standards, we cannot say that the *First Amendment* prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public *and other schools.*"

Plaintiffs present plausible arguments to support their contentions of unconstitutionality and argue, inter alia, (1) that *Everson*, 330 U.S., *supra*, is no longer *the* law because three of the five majority Justices in that case have died and another one has changed his views," and (2) subsequent decisions of the Supreme Court have abandoned or changed some of the reasoning or statements upon which the majority relied in that case. See and compare, *Abington School Dist. v. Schempp*, 374 U.S. *supra*; *McGowan v. Maryland*, 366 U.S. 420; *Engel v. Vitale*, 370 U.S. 421, 442; *Sherbert v. Verner*, 374 U.S. 398, 410.

In order to determine the contentions and the issues raised by the parties, we shall briefly analyze and review the subsequent cases which have been relied upon by one or more of the parties.

11—I agree with the Court's decision, but it is this writer's opinion, [illegible]

The Supreme Court in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, struck down as violative of the First Amendment the teaching of religion in public school buildings by outside teachers supplied by various denominations under a "released time for children" arrangement between them and the Board of Education. Under this arrangement the Board released the public school children for limited periods and allowed the use of the school buildings for the teaching of various denominational beliefs by outside religious teachers and clergy of about basically equal. On the other hand the Supreme Court in *Zorach v. Clauson*, 343 U.S. 306, held Constitutional a "released time" program for the religious education of public school children (of the grammar grade school), in which for brief periods the school released children whose parents desired them to receive religious instruction in their own Churches and

Engel, et al. v. Vitale, et al., 370 U.S. 421, 422, the Court declared Unconstitutional a directive by the [illegible] to recite the following prayer, to be said [illegible] at the beginning of the school day, although no student was compelled to join in the prayer over his or his parent's

U.S., supra, and in *Abington School District v. Schempp*, 374 U.S., supra. In *McGowan v. Maryland*, supra, where a divided Court in Opinions covering 165 pages examined and reviewed prior decisions and after quoting from approved (on pages 443-444) *Everson v. Board of Education*, [illegible] *Constitutional* a Maryland law which generally prohibited the sale on Sunday of all merchandise, although it contained many specific exceptions and limited the act to retailers in one county. The Court held, inter alia, that the purpose and effect of the statute was for the public welfare, i.e., not to aid religion, but to set aside a day of rest and recreation for the public at large.

In *Abington School District v. Schempp*, 374 U.S. supra, the Court said (pages 205-225):

"Once again we are called upon to consider the scope of the provision of the First Amendment to the United States Constitution which declares that 'Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . .' The combination cases present the issues in the context of state action requiring that schools begin each day with readings from the Bible. While raising the basic questions under slightly different factual situations, the cases present of joint treatment. In light of the history of the First Amendment and of our cases interpreting and applying its requirements, we hold that the practices at issue and the laws requiring them are unconstitutional under the Establishment Clauses, as applied to the states through the Fourteenth Amendment.

[illegible]

Opinion—Supreme Court of Pa.

"... The Commonwealth of Pennsylvania by law ... requiring that [at least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on every school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.

"... Participation in the opening exercises, as directed by the statute is voluntary. ...

"It is true that religion has been closely identified with our history and government. As we said in Engel v. Vitale, 370 U.S. 421, 434, (1962), 'The history of man is inseparable from the history of religion. ...' The fact that the Founding Fathers believed devoutly that there was a God and that the unalienable rights of man were rooted in His laws, enforced in their writings, from the Mayflower Compact to the Constitution itself. This background is reflected today in our public life through the continuance in our courts of oaths from the Presidency to the Aldermen of the local communities. 'So help me God.' Likewise each House of the Congress provides through its Chaplain an opening prayer, and the sessions of this Court are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God. Again, there are such

[illegible] and that every daily session of the State Supreme Court [illegible]

manifestations in our military forces, where those of our citizens who are under the restrictions of military service wish to engage in voluntary worship. Indeed, only last year an official survey of the country indicated that 64% of our people have church membership. Bureau of Census, U.S. Department of Commerce, Statistical Abstract of the United States, 48 (83d ed. 1962), while less than 2% profess no religion whatever. Id., at p. 46. It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are 'earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his . . . blessing.' . . .

"This freedom to worship was indispensable in a country whose people came from the four quarters of the earth and brought with them a diversity of religious opinion. Today authorities list 83 separate religious bodies, each with memberships exceeding 50,000, existing among our people, as well as innumerable smaller groups . . .

". . . [and then, most importantly, the Court said]

". . . The test may be stated as follows: *what are the purpose and the primary effect of the enactment?* If either is the advancement or inhibition of religion then the enact-

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1865, the words 'In God we Trust' have been impressed on our coins and imprinted on our paper money. The Pledge of Allegiance to the Flag contains the words 'One Nation under God, indivisible, with liberty and justice for all.'

14—[illegible] and does express religious sentiments accepted by the majority of the people. [illegible] to the [illegible] that what the Supreme Court [illegible] to [illegible] of religious [illegible] as [illegible]

ment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause *there must be secular legislative purpose and a primary effect that neither advances nor inhibits religion.* Everson v. Board of Education, supra; McGowan v. Maryland, supra, at page 442.

To summarize: notwithstanding the difficulty of reconciling all of the aforesaid cases, I believe that *Everson v. Board of Education*, 33 U.S. supra, and *Abington School District v. Schempp*, 374 U.S., supra, are still the law and require us to hold that the Amendatory Act of 1965 does not violate the First or Fourteenth Amendment of the Constitution of the United States.

Does the Amendatory Act of 1965 violate the Constitution of Pennsylvania?

Plaintiffs contend that the 1965 Amendatory Act violates Article I, Section 3, and Article III, Section 7 and Section 18, and Article X, Section 2, of the Constitution of Pennsylvania.

The principle is well settled in Pennsylvania that an Act will be declared unconstitutional only if it "clearly, palpably, and plainly" violates the Constitution. *Milk Control Commission v. Breakey*, 412 Pa. 652, 659, 196 A. 2d 840; *Duke v. Hospital*, 411 Pa. 263, 271, 191 A. 2d 835, *Dauphin Deposit Trust Co. v. Myers*, 398 Pa. 444, 450, 130 A. 2d 686, and *Harris v. Allegheny Co. Sports & Exhibition Auth.*, 370 Pa. 150, 158, 87 A. 2d 424.

For many years, Catholic [illegible] 77 Pa. [illegible], 117 Atl. 440, was considered the leading case in this field. In Commonwealth v. [illegible] the Supreme Court [illegible] in this opinion [illegible] Constitutional [illegible] Legislature [illegible] Constitutional [illegible] in the exercise of [illegible]

Pittsburgh and to St. Timothy's Memorial Hospital and to the Duquesne University of the Holy Ghost and to the Dubois Hospital Association and to the Jewish Hospital Association of Philadelphia. Each of these hospitals was a very worthy charity. Each contended that it was not a denominational or sectarian institution. Each of the hospitals admitted persons without regard to their religious faith and had non-sectarian directors and boards composed of various denominations to conduct the hospitals and to take part in its management, and each proclaimed that it was not a sectarian or denominational institution. The Court held (a) that Article III, Section 18,[15] forbids State aid to all institutions affiliated with a particular religious sect or denomination, or which are under the control, domination or governing influence of any religious sect or denomination, and therefore, (b) the appropriations, even though they had been made without question or complaint for a period of 40 years, were *Un*constitutional. Chief Justice Moschzisker, speaking for a unanimous Court said (pages 434-435): "... long persistence in a breach of the Constitution neither warrants the course pursued nor gives it legality: Kucker v. Sunlight, etc., Oil Co., 230 Pa. 528, 533.

"It is quite apparent that the creation of the so-called local board represents simply an effort to make the Passavant Hospital appear as though it were now denominational institution, and thus enable it to obtain state aid; but that which cannot be done directly the law will not permit to be accomplished by indirection, for such a course, when adopted by the courts, only serves to bring the law into contempt. The appropriations under attack, having in fact been made to

15—Quoted hereinafter.

a sectarian and denominational institution, cannot stand in law. (Pages 436-437)

". . . While all persons, without distinction of race, color or religion, are admitted to defendant hospital, yet there can be no doubt that it is a sectarian institution within the meaning of that term as used in the Constitution; therefore the appropriation to it fails in law. (Page 437)

". . .

"*We cannot but see that the arrangement before us is nothing more nor less than a plan to evade the Constitution.* No doubt the plan was honestly conceived, in the belief that it was permissible and would prove effective; but this makes it none the less a *legal subterfuge.* The pruning knife of the law *eliminates all such devices, and lays bare the realities of the situation,* with which we must deal; these show the hospital named in the appropriation act to be under the control of a well known, much respected, religious order, and the state's money cannot be permitted to go through the agency of the hospital association to this sectarian institution, since it falls within the class to which that character of recognition is forbidden by the Constitution. (Pages 439-440)

". . . Those who adopted the restriction against appropriating money to sectarian institutions must change the rule, if desired, either through an amendment to the present Constitution or by making a new one; neither the legislature, acting alone, nor the courts have power to do so." (Page 441)

one form or another, in the constitutions of many American commonwealths. *The intent* of these provisions was, and therefore still is, *to forbid the state from giving, either directly or indirectly*, any recognition to a religious sect or denomination, *even in the fields of public charity and education*; they in effect provide that, to serve charitable, educational or benevolent purposes, the money of the people shall not be put under denominational control or into sectarian hands, for administration or distribution, *no matter how worthy the end in view*. (Page 432)

In other words, the Court held that the language, meaning and intent of this provision of the Constitution was clear and plain, *and no worthy objective would be allowed to circumvent or distort it or to give taxpayers' money directly or indirectly by evasion or circumvention or subterfuge to or for the benefit of a sectarian church, hospital or charitable institution, body, group, sect or denomination, even for very benevolent or important educational purposes.*

Collins v. Kephart has been cited several times with approval, and has never been overruled or distinguished.

In *Constitutional Defense League v. Waters, et al.*, 308 Pa. 150, 162 Atl. 216, which arose by a taxpayer's bill in equity seeking injunctive relief, this Court in a unanimous Opinion held that a charitable appropriation by the Legislature to a sectarian hospital was *Unconstitutional* because it violated Article III, Section 18, of the Constitution of Pennsylvania. The Court quoted with approval excerpts from *Collins v. Kephart, et al.*, 271 Pa., *supra*. The case is well summarized in the following paragraph of the syllabus:

"Article III, section 18, of our state Constitution, forbids state aid to institutions affiliated with a particular religious sect or denomination, or which are under the control,

domination or governing influence of any religious sect or denomination."

In spite of the *Collins* and *Constitutional Defense League v. Wiwen* cases, supra, and *Snyder v. Newtown*, 147 Conn. 374, 161 A. 2d 770,* the Commonwealth contends that the recent case of *Schade v. Allegheny County Inst. Dist.*, 386 Pa. 507, 126 A. 2d 911, sustains the constitutionality of the Amendatory Act of 1965. *Schade* is clearly distinguishable on its facts. *That case correctly decided* that payments by an institution district, or by any State Agency for the support, care and maintenance of delinquent, neglected or dependent children placed by the Juvenile Court in sectarian or denominational homes and institutions do not violate Article III, Section 18, of the Pennsylvania Constitution nor the due process clause of the Fourteenth Amendment. The Court pertinently said (pages 510-512):

The Court pertinently said (pages 510-512):

"It was the plaintiffs' contention below, which the appellant renews here, that the payments made by the Institution District to the named denominational and sectarian

* In the Snyder case, the highest Court in Connecticut held that a statute which authorized the town to transport at public expense children to non-profit private schools did not violate the Federal or the State Constitutional provisions respecting establishment of religion, but that insofar as it purported to make available for the transportation of pupils attending non-profit private schools [illegible]

institutions for the board, care and maintenance of dependent and neglected children committed thereto by the Juvenile Court of Allegheny County violated Article III, Section 18 of the Pennsylvania Constitution which provides that 'No appropriations shall be made for charitable, educational or benevolent purposes *to any person* or community *nor to any denominational and sectarian institution, corporation or association.*' The appellant also contends that such payments violate the due process clause of the *Fourteenth Amendment* of the Federal Constitution by effecting a deprivation of the liberty guaranteed by the First Amendment through the prohibition respecting 'an establishment of religion.' This question was not raised in the court below and got into the case solely by being dealt with by the dissenting chancellor upon the entry of the final decree by the court en banc.

"The opinion for the court [below] is based principally on the conclusion that the inhibition of Article III, Section 18 of the Constitution is directed solely against appropriations of State funds by the legislature and *does not apply to a governmental agency such as an Institution District. With that, we are unable to agree. . . .* It would be strange, indeed, if the legislature by creating a body politic or corporate to exercise a legislative function could do indirectly what it may not do directly. It seems too plain for cavil that, if a mere creature of the legislature can do what the legislature itself is constitutionally prohibited from doing, the carefully designed prohibition of Section 18 of Article III could readily be rendered useless. Such a result is not to be countenanced: *Collins v. Kephart*, 271 Pa. 428, 439, 117 A. 440.

"We, therefore, choose to bottom our decision on the ground that payments made by the Institution District for

the support and maintenance of neglected or dependent children, who are under the jurisdiction and control of the Juvenile Court, *are not appropriations*[16] within the meaning of that term as employed in Section 18 of Article III. . . .

"The cost of the maintenance of neglected children either by the State or the County is neither a charity nor a benevolence, but a *governmental duty* [irrespective of the religion of a neglected child]. All the plaintiffs proved was that the monies received by the defendant institutions were in partial reimbursement for the cost of room and board of such minors[17] . . . A considerable part of this money is recouped by the Juvenile Court from the parents of these minor wards. The balance of the funds so expended are, *in legal effect*, payments to the child,—not the institution supporting and maintaining him or her. [See Cochran v. Board of Education, 281 U.S. 370, 374-375][18] . . ."

The Court then added by way of dictum (page 512-513):

"The appellant's further contention that such payments by the Institution District are in violation of the due process clause of the Fourteenth Amendment is equally un-

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16—It must be remembered that appropriations can be made only from revenues obtained from taxes or borrowing.

17—Moreover, it is a matter of common knowledge that places for the [illegible] of neglected children are both insufficient in number and in many cases inadequate.

18—In Cochran, the Court held that an appropriation by the State of money derived from taxation to the purchasing of school books free [illegible] by parochial schools does not violate the Fourteenth [illegible] of private property for private purposes [illegible] the books [illegible] pupils and not to the schools, [illegible] only as a means of the education of the children, [illegible] and [illegible] religious or sectarian [illegible].

meritorious. Inasmuch as this point was not raised in the court below nor there passed upon by the majority, we are not required to consider it here: Sherwood v. Elgass, 353 Pa. 110, 115, 117 A. 2d 899. We shall, however, point out the fallacy of the appellant's argument.

"As it has been held that the concept of liberty as used in the due process clause of the Fourteenth Amendment, secures to the individual as against state action the same rights as are guaranteed against congressional action by the First Amendment (Cantwell v. Connecticut, 310 U.S. 296, 303; Murdock v. Pennsylvania, 319 U.S. 105, 109; Everson v. Board of Education, 330 U.S. 1, 15; and McCollum v. Board of Education, 333 U.S. 203, 211), the appellant argues that the Institution District's payments to the denominational or sectarian defendants *tend toward governmental 'establishment of religion'* and, consequently, are violative of the Fourteenth Amendment. . . . The Supreme Court has, in principle, settled it adversely to the appellants position. See Everson v. Board of Education, supra, where it was held that a State's *use of public tax funds* for the transportation of pupils *to and from sectarian schools did not serve to promote the establishment* of religion."

We approve the decision in *Schade*, but not that part of its language which conflicts with and is irreconcilable with the Court's decision in *Collins v. Kephart*, 371 Pa., supra, which it cites with approval.

Furthermore, we must consider not only Article III, Section 31, but also Article III, Section 7, and Article X, Sections 1 and 2, of our Constitution, which must be considered and construed together in determining their meaning, for unless this be done, the Amendatory Act of 1937, which

...through the Public School Code, violates these or any other provisions of the Constitution of Pennsylvania.

Article III, Section 7, of the Constitution of Pennsylvania prohibits the General Assembly from passing any local or special law "regulating the affairs ... of school districts, [or] granting to any ... individual any special or exclusive privileges ..."

Article X, Section 1, provides: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years may be educated ..."

Article X, Section 2, provides as follows:

"Education, Public Schools Provided for ...

"Sectarian Schools Not to Receive Public School Money.

"Section 2. No money raised for the support of the Commonwealth shall be appropriated to or used for the support of any sectarian school."

It should be [illegible] observed that the language of the [illegible] Constitution differs greatly from the pertinent language of the [illegible] of the Constitution of the [illegible] Law [illegible] "any law [illegible] the Constitution [illegible] A public [illegible] and [illegible] [illegible] [illegible]

In Article III, Section 18, provides: "No appropriation shall be made for charitable, educational or benevolent purposes to any person or community nor to any denominational or sectarian institution ..."[9] Considering all the aforesaid Articles together, as of course we should, it is crystal clear that no money raised by the Commonwealth or by any of its agencies or by any governmental institution can be used for the support of any sectarian school, or used to grant any special privilege to the children who attend it, no matter how worthy and benevolent that sectarian school or institution is, and no matter how beneficial these grants to the children or their parents would be.

The raising of money by taxes or by borrowing, or the expenditure of public funds to provide transportation not *for all* school children in Pennsylvania *but only for children who attend public or sectarian schools* which are not operated for profit, clearly violates the spirit, the meaning and the intent of the aforesaid provisions of the Pennsylvania Constitution, and, we believe, the language thereof. These Constitutional provisions are of such tremendous importance to *all* the people of Pennsylvania that no circumvention, dilution or distortion should be allowed to evade or nullify or make a mockery of them. The 1965 Amendatory Act undoubtedly benefits healthwise and safetywise a restricted class of school children, as well as sectarian schools. If it is both reasonable and necessary to protect the safety and health of public school children and sectarian school children by the State's use of public or institutional tax funds for their transportation to school, how can it be reasonable and legal and Constitutional and not arbitrary and discriminatory

9—With certain provisions, grants and exceptions not here pertinent.

sary, to exclude private school children from the benefits of these health and safety measures?[20]

The title of the 1965 Act states that its purpose is to "provide for the health, welfare and safety of the children of the Commonwealth", and yet in the very same breath excludes those children who attend schools which are operated for profit. The fact that the so-called School Bussing law or its 1965 amendment does not provide for the transportation of all school children, regardless of the kind of school they attend, demonstrates that the *real "purpose and the primary effect"* of the Act of 1965 was to benefit and protect the health and safety of only sectarian school children (as well as, indirectly, their schools), *rather than to provide for and protect the health and safety of all the school children of Pennsylvania.*

To express it in other words, if this *1965 Act* is, as its proponents contend, really for the protection of the health and safety of *all* school children but only of *sectarian* school children, by providing public funds for the protection of the health and safety of *this special class* of school children, *i.e.*, sectarian school children, then it is

[20] We further note that under Section 1362 of the Public School Code [illegible] transportation of resident pupils of public and sectarian [illegible] may be provided out of the funds of the school district, [illegible] (1) [illegible] public school [illegible] [illegible] miles and a half, and [illegible] (2) [illegible] other school [illegible] private [illegible] What [illegible] [illegible] [illegible]

unreasonable, arbitrary and insidiously discriminatory, and such an obviously patent device to circumvent and nullify the Constitution as to be clearly and beyond any doubt Unconstitutional.

Legislative Classifications

We may add that there is another barrier which the majority does not even discuss. Legislative classifications are permitted in Pennsylvania and are Constitutional, provided they are not unreasonable and arbitrary and have a reasonable basis for the distinctions and classifications they make. We all agree that the wisdom or lack of wisdom of an Act is a matter for the Legislature and not for the Courts, and that classifications and distinctions will be sustained provided they are "reasonable and founded upon a genuine distinction."

The law is well expressed in *Kurtz v. Pittsburgh, et al.*, 346 Pa. 362, 31 A. 2d 257, where the Court held unconstitutional, as being in plain controvention of Article III, Section 7, the Act of June 7, 1917, as amended. That Act provided for the payment to dependent wives of public employees in the armed forces of the United States of a specified portion of their salary. In a lengthy 24-page Opinion, the Court analyzed and reviewed many of the cases involving the question of a violation of Article III, Section 7, of the Pennsylvania Constitution,[21] and pertinently said (Pp. 367, 368, 369):

21—For a more recent analysis and review of many decisions of this Court and of the Supreme Court of the United States, see the dissenting Opinion in Bargain City U.S.A. v. Dilworth, 407 Pa. 135-142.

"Class legislation has frequently been declared void by this Court, and what is class legislation has been defined and illustrated in a long line of decisions. In Penna. Co. for Insurances on Lives and Granting Annuities et al., Appellants, v. Scott, Prothonotary, et al., 329 Pa. 534, 198 A. 115, this Court in an Opinion by Mr. Justice LINN quoted what was said in Laplacca et ux v. Phila. Rapid Transit Co., 265 Pa. 304, 108 A. 612, as follows: *'The basis for classification must be reasonable and proper and founded upon a real, and not merely artificial, distinction* between the members of the class and the general public, and based upon "a necessity springing from manifest peculiarities, clearly distinguishing those of one class from each of the other classes, *and imperatively demanding legislation for each class, separately, that would be useless and detrimental to the others*".'

". . . In Ayars' Appeal, 122 Pa. 266, 16 A. 356, Justice STERRETT said: 'The underlying principle of all the cases is that classification . . . is essentially unconstitutional, unless a necessity therefor exists [a necessity springing from manifest peculiarities, clearly distinguishing those of one class from each of the other classes and imperatively demanding legislation for each class separately, that would be useless and detrimental to the others] . . .' This principle was applied in Commonwealth ex rel. Brown v. Gumbert et al, 256 Pa. 531 [534], 100 A. 990. Although the legislation under attack there was 'humanitarian', we said that a 'positive constitutional requirement' cannot be disregarded because of an act's 'beneficent aim.'

". . . arbitrary selection can never be justified by calling it classification . . ."

22—Judge in Error Opinion.

See also *Davis, et al. v. Sulcowe*, 81 Dauphin 72 (1953), wherein it was held that there was no basis for distinguishing between nonprofit nursing homes and proprietary nursing homes for minimum wage requirement purposes.

Because the 1965 Amendatory Act has such an important and beneficial purpose and objective, it is with great regret that I feel I must dissent and hold that the Amendatory Act of 1965, with its arbitrary and unreasonable distinctions and classifications—which do not imperatively demand safety and health protection for sectarian school children *which would be useless and detrimental to private school children*—is clearly and plainly unconstitutional.

DISSENTING OPINION

COHEN, *J.* FILED: January 17, 1967.

The act in question violates, in my opinion, both the Pennsylvania Constitution and the Federal Constitution, and is further void for vagueness and incompleteness. Moreover, it is premised upon the subterfuge of the "child benefit" theory, and the present case comes before us with a record insufficient to substantiate the arguments made in support of the statute.

Article 10, sections 1 and 2 of the Pennsylvania Constitution provide:

> "§1. Public school system
> "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose.
> "§2. Diversion of school moneys to sectarian schools
> "No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school."

Section 1 is a mandate to the legislature to maintain and support a system of public schools. Section 2 is a prohibition against the diversion of public school tax moneys to or for the support of sectarian schools. As I view the matter, in a society which tends to increase the size of schools and to erect them ever further from the homes of the students, the

provision of transportation to and from school has become an integral function of the educational system and is a direct aid thereto. Accordingly, where the school system is sectarian, the provision of tax supported transportation for the purpose of affording a daily pilgrimage to a place offering religious training is an appropriation to a sectarian institution in violation of Article 10, section 2 of the Constitution of this Commonwealth.

Regarding the First Amendment arguments, I recognize the apparent binding effect of *Everson v. Board of Education*, 330 U.S. 1 (1947). However, I believe that certain more recent statements of the Supreme Court have to a great extent diminished the force and impact formerly enjoyed by Everson. In *Illinois ex rel McCollum v. Board of Education*, 333 U.S. 203 (1947), the Court held that a "released time" arrangement whereby pupils were permitted to receive religious instruction in public school buildings during regular school hours was in violation of the First Amendment principle of separation of church and state; in *Torasco v. Watkins*, 367 U.S. 488 (1961), the Court held that the requirement of the Maryland Constitution that every office holder must declare a belief in the existence of God violated the First Amendment as an invasion of the individual's freedom of belief and religion; in *Engel v. Vitale*, 370 U.S. 421 (1962), the Court held that the use of the public school system to encourage recitation of a brief non-denominational prayer was inconsistent with the establishment clause; and in *Abington School District v. Schempp*, 374 U.S. 203 (1963), the Court held that school exercises requiring the reading of Bible verses or the Lord's Prayer violated the establishment clause. Especially significant in the last three cases of the series of *Everson* is Justice Douglas, who was among the five majority

justices in *Everson* but who in *Engel* stated in a concurring opinion that as he reconsidered the decision in *Everson*, it was inconsistent with the First Amendment and that the dissenting opinion of Justice Rutledge in *Everson* was better law. I should like the United States Supreme Court finally to decide this case so that they may reconsider the *Everson* doctrine. Accordingly, I would appoint a master in each case with instructions that a record be made upon which both this Court and the United States Supreme Court might more meaningfully reach a decision.

The act in question is further void inasmuch as it is vague and incomplete. The statute authorizes busing "over established public school bus routes" and requires nonpublic school pupils to be transported to and from "the point or points on such routes nearest or most convenient to the [nonpublic] school which such pupils attend." The Attorney General, apparently realizing that as enacted the statute remained too vague to be implemented, outlined in a letter to the Acting Superintendent of Public Instruction several guidelines for the implementation of the act. In it the Attorney General declared that a school board may make deviations from established routes, may make new routes and reroutes, and may reestablish routes in order to accommodate nonpublic school children. In addition, he defined as part of the established public school bus route any distance which a school bus is required to travel beyond a public school in order to complete its trip or reach its place of storage. In effect, the Attorney General assumed the role of an advocate of the legislature and rather than interpret the act, rewrote it to serve his own position. Finally, the statute provides the General Assembly and [illegible] with [illegible] Neither the Attorney General nor this Court may

write legislation for the General Assembly, and when that body has failed to include certain essential requirements in an enactment, neither the executive nor the judiciary may under the guise of interpretation add the missing requirements. *Altieri v. Allentown Officers' and Employees Retirement Board*, 368 Pa. 176, 81 A. 2d 884 (1951); *Akins v. York Officers' and Employees' Retirement Board*, 368 Pa. 182, 81 A. 2d 883 (1951); *Note, The Void-for-Vagueness Doctrine*, 109 U. Pa. L. Rev. 67 (1960).

Finally, on the record (or lack of one) before us, I am unable to conclude that this statute may be sustained by virtue of the "child benefit" theory. It is obvious that that theory is merely a subterfuge by which its supporters justify the enactment in question. For one thing, the act does not provide free transportation for all pupils. It excludes from the enjoyment of its benefits students who attend private schools operated for profit. I can see no basis for omission of these children if the statute was truly enacted for the safety and welfare of the children of our Commonwealth. The reason is clear, however, because an examination of the statute indicates that safety was not the predominant motive for its passage. The act, as passed, will actually *increase* the danger to children who formerly were transported from their homes to the private or parochial schools in privately operated buses. The act provides for transportation of such pupils to and from points on established school bus routes "nearest or most convenient to the [nonpublic] school . . ." This statute completely ignores the additional hazards that imperil these children, and cannot be sustained by reference to a makeshift "child welfare" theory. The only way this provision can truly serve the welfare of the children of the Commonwealth is that it be implemented by providing to the

nonpublic school children the same service accorded to those that attend public school. That means taking them to and bringing them from their schools and by so doing, clearly violating the Pennsylvania and Federal Constitution. As I have indicated, bus transportation has become an integral part of the process of education and any improvement in the transportation of pupils must be considered as an aid to the schools. In fact, the statute in question, in addition to the provisions herein considered, provides for free transportation of public school pupils for tours "connected with the educational pursuits of the pupils." The act was passed as an aid to education and that is all. Since it grants tax supported benefits to sectarian educational institutions it is unconstitutional. That is all there is to it.

I dissent.

APPENDIX B

Copy of the order appealed from:

"Complaints in the Courts Below Dismissed, with costs on the complainants.

Musmanno, J.

Mr. Justice Jones files a concurring opinion.

Mr. Justice Roberts files a concurring opinion in which Justice Jones, Eagen and O'Brien join.

Mr. Justice Cohen files a dissenting opinion.

Mr. Chief Justice Bell files a dissenting opinion.

Remitted."

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In the Supreme Court of the United States

May Term, 1967

No. [redacted] 225

BRENARD G. RHOADES, FREDERICK E. STEWART, JR., ELIZABETH W. STEWART and A. G. MUTIMER

vs.

SCHOOL DISTRICT OF ABINGTON TOWNSHIP,
Defendant

and

COMMONWEALTH OF PENNSYLVANIA,
Intervenor

and

THOMAS J. PAUL, JANE PAUL, ALVIN E. STRACK, CAROL STRACK, FRANK A. BLUST, MARGARET S. BLUST, H. LAVERNE ROSENBERGER, JOHN D. O'HARA, and REVEREND ROBERT E. NICHOLAS,
Intervenors

On Appeal from the Supreme Court of Pennsylvania

MOTION TO DISMISS OR TO AFFIRM

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Case Caption

IN THE SUPREME COURT OF
THE UNITED STATES

May Term, 1967
No. 1457

BRENARD G. RHOADES, FREDERICK E. STEWART, JR., ELIZABETH W. STEWART and A. G. MUTIMER

vs.

SCHOOL DISTRICT OF ABINGTON TOWNSHIP,
Defendant

and

COMMONWEALTH OF PENNSYLVANIA,
Intervenor

and

THOMAS J. PAUL, JANE PAUL, ALVIN E. STRACK, CAROL STRACK, FRANK A. BLUST, MARGARET S. BLUST, H. LAVERNE ROSENBERGER, JOHN D. O'HARA, and REVEREND ROBERT E. NICHOLAS,
Intervenors

On Appeal from the Supreme Court of Pennsylvania

MOTION TO DISMISS OR TO AFFIRM

OPINIONS BELOW

The opinions of the Pennsylvania Supreme Court are reported at 424 Pa. 202 and 226 A. 2d 53.

JURISDICTION

It is recognized that the statutory provisions upon which the appeal herein is based are contained in Title 28, United States Code, Section 1257 (2) and Section 2101.

COUNTERSTATEMENT OF QUESTION PRESENTED

---

1. Was the Supreme Court of Pennsylvania correct in holding that the statute (requiring public school districts which provide school bus transportation available to nonpublic school children along established public school bus routes) does not violate the disestablishment clause of the First Amendment to the Constitution of the United States as applied to the states by the Fourteenth Amendment to the said Constitution?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Appellants fail to recite any constitutional provisions which they deem to be involved.

The pertinent provisions of the Pennsylvania statute involved are adequately set forth in the Jurisdictional Statement at pp. 3, 4, 5.

MOTION TO DISMISS OR TO AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal in this proceeding be dismissed, or, in the alternative, that the final judgment of the Supreme Court of Pennsylvania be affirmed, on the ground that the question is not substantial.

ARGUMENT

Intervenors Thomas J. Paul, et al., join in the argument contained in the Motion to Dismiss or to Affirm by the Commonwealth of Pennsylvania, filed heretofore in this proceeding.

CONCLUSION

For the reasons stated it is respectfully submitted that the appeal should be dismissed, or, in the alternative, that the judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted,

WILLIAM F. FOX,
WILLIAM B. BALL,
Attorneys for Intervenors

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IN THE

Supreme Court of the United States

May Term, 1967
No. [redacted] 225

BRENARD G. RHOADES, FREDERICK E. STEWART, JR., ELIZABETH W. STEWART and A. G. MUTIMER

vs.

SCHOOL DISTRICT OF ABINGTON TOWNSHIP,

Defendant

and

COMMONWEALTH OF PENNSYLVANIA,

Intervenor

and

THOMAS J. PAUL, JANE PAUL, ALVIN E. STRACK, CAROL STRACK, FRANK A. BLUST, MARGARET S. BLUST, H. LAVERNE ROSENBERGER, JOHN D. O'HARA, and REVEREND ROBERT E. NICHOLAS,

Intervenors

On Appeal from the Supreme Court of the Commonwealth of Pennsylvania

MOTION TO DISMISS OR TO AFFIRM BY COMMONWEALTH OF PENNSYLVANIA, Intervenor

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IN THE SUPREME COURT
OF THE UNITED STATES

May Term, 1967
No. 1457

Brenard G. Rhoades, Frederick E. Stewart, Jr., Elizabeth W. Stewart and A. G. Mutimer

vs.

School District of Abington Township,
Defendant

and

Commonwealth of Pennsylvania,
Intervenor

and

Thomas J. Paul, Jane Paul, Alvin E. Strack, Carol Strack, Frank A. Blust, Margaret S. Blust, H. Laverne Rosenberger, John D. O'Hara, and Reverend Robert E. Nicholas,
Intervenors

On Appeal From the Supreme Court of the Commonwealth of Pennsylvania

MOTION TO DISMISS OR TO AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal in this proceeding be dismissed, or, in the alternative, that the final judgment of the Supreme Court of Pennsylvania be affirmed, on the ground that the question raised by Appellants has been definitively adjudicated by this Court and is therefore not of such substance as to warrant further argument.

OPINIONS BELOW

The opinions of the Pennsylvania Supreme Court are reported at 424 Pa. 202 and 226 A. 2d 53.

The above-cited Opinion was rendered in connection with the case here on appeal and the case of Betty J. Worrell vs. George W. Matters et al., both of which cases were argued together. The latter case is presently pending before your Honorable Court at No. 1318 October Term, 1966 on Petition for Writ Certiorari to the Supreme Court of Pennsylvania.

JURISDICTION

It is agreed that the statutory provisions upon which the appeal herein is based are contained in Title 28, United States Code, Section 1257(2) and Section 2101.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Appellants fail to recite any constitutional provisions which they consider to be involved.

The pertinent provisions of the Pennsylvania statute involved are adequately set forth in the Jurisdictional Statement, at pp. 3, 4, 5.

COUNTERSTATEMENT OF QUESTION PRESENTED

1. Was the Supreme Court of Pennsylvania correct in holding that the statute (requiring public school districts which provide school bus transportation to public school children to make such transportation available to nonpublic school children along established public school bus routes) does not violate the disestablishment clause of the First Amendment to the Constitution of the United States as applied to the states by the Fourteenth Amendment to the said Constitution?

ARGUMENT

The decision of the Supreme Court of Pennsylvania is plainly correct.

1. The federal question has been adjudicated. It has long been settled that the existence of a prior indistinguishable decision is an obvious basis for summary disposal of an appeal. *Equitable Life Assurance Society v. Brown*, 187 U.S. 308, 311 (1902). The constitutional issue asserted by appellants has been conclusively adjudicated and determined by this Honorable Court in *Everson v. Board of Education*, 330 U.S. 1 (1947). That decision squarely held that a statute such as that here challenged does not violate the First Amendment to the federal constitution.

Appellants present no argument affording any distinction between the *Everson* case and the instant case. It is significant that *all seven* Justices of the Pennsylvania Supreme Court (including the two dissenting Justices) were unanimous in their express recognition of the validity of Act 91 under the Constitution of the United States as interpreted by this Honorable Court in *Everson*. As Bell, C. J., one of the dissenters, stated:

> "So far as the 'Establishment Clause' is concerned, I believe that the present cases are ruled by the leading case of Everson v. Board of Education, 330 U.S., supra, where the facts and issues are strikingly similar."

Rhoades et al. v. School District of Abington Township, 424 Pa. 202, 240 (1967).

This Court has recently reviewed the single constitutional issue herein involved and ruled adversely to petitioner's contentions. In 1961 a decision by the Connecticut Supreme Court of Errors, upholding the constitutionality of a Connecticut statute providing transportation at public expense for nonpublic school children [1], was appealed to this Honorable Court which dismissed the appeal for want of a substantial federal question [2].

2. Appellants present no arguments, not previously before this Court, showing a substantial federal question. Appellants call upon this Honorable Court to hand down a "carefully worded opinion . . . which points out that the public taxpayer may not be called upon to directly or indirectly finance churches or their schools, through the supplying of a transportation system. . ." (Jurisdictional Statement, p. 13.) It is submitted that the opinion of this Court in the *Everson* decision was not only carefully worded but expressly and fully took into account such arguments as appellants now raise. Appellants, in their Jurisdictional Statement, advance nothing in addition which lends basis to their claim that a substantial federal question is presented.

---

[1] *Snyder v. Newton*, 147 Conn. 374 (1961).
[2] 365 U.S. 299 (1961).

CONCLUSION

It is respectfully submitted that the appellants present no substantial question for the decision of this Court, and that therefore, this appeal should be dismissed, or, in the alternative the judgment of the Supreme Court of Pennsylvania should be affirmed.

Respectfully submitted,
JOHN P. McCONN
Deputy Attorney General
EDWARD FRIEDMAN
Counsel General
WILLIAM C. SENNETT
Attorney General
Attorneys for Commonwealth of Pennsylvania, Intervenor

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

RHOADES ET AL. *v.* SCHOOL DISTRICT OF ABINGTON TOWNSHIP ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

No. 225. Decided October 9, 1967.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.